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Legal instinct

Instynkt prawniczy

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Abstract:

The aim of the paper is to analyse the concept of legal instinct. Four proposals of understanding this phenomenon are assessed: as pre-understanding, as the capacity to recognize legal rules, as a kind of precognition about legal facts and as an inborn cognitive ability. This division allows not only to organize the discussion pertaining to this issue, but also to indicate the conceptual connections between the concept of legal instinct and concepts in its direct vicinity, e.g. the concept of intuition. The considerations end with an outline of the role of instinct in legal cognition.

Keywords:

legal instinct, legal intuition, legal cognition, legal reasoning

Streszczenie:

Celem artykułu jest analiza pojęcia instynktu prawniczego. Omówione zostały cztery propozycje rozumienia tego zjawiska: jako przedrozumienia, jako zdolności rozpoznawania reguł prawnych, jako rodzaju przedwiedzy o faktach prawnych oraz jako wrodzonej zdolności poznawczej. Ów podział pozwala na uporządkowanie dyskusji dotyczącej tego zagadnienia, a także wskazanie związków pomiędzy pojęciem instynktu prawniczego oraz pojęć blisko z nim związanych, jak choćby pojęcia intuicji. Rozważania kończą się naszkicowaniem roli instynktu w poznaniu prawniczym.

Słowa kluczowe:

instynkt prawniczy, intuicja prawnicza, poznanie prawnicze, rozumowanie prawnicze

Introduction

For obvious reasons, I will not undertake a more in-depth reflection on the phenomenon of instinct. Commenting on about 150 years of discussion on this subject goes far beyond the scope of this study, as well as my competence. Instinct has been understood differently by biologists, ethnologists, and in yet another way – by psychologists, especially by proponents of evolutionary psychology. Furthermore, it has been conceptualized in a very different manner by neuroscientists. Encyclopedic definitions most often refer to instinct as a genetically conditioned (inborn and hereditary) capacity of animals and humans to perform certain activities necessary for their survival. In turn, the 'self-preservation instinct' would mean an adaptive ability to survive of both individuals and the entire species.

How should a legal instinct be understood in the face of all of this? Can one talk about instinct at all in relation to legal knowledge? Certainly, legal knowledge has many specific features that distinguish it from standard scientific knowledge.

These differences also pertain to the issue of understanding of legal instinct. First and foremost, legal instinct is not present, as it is often assumed by biologists, at the same stage of development of all individuals, and not in all individuals, and its strength is usually variable among individuals[1].

From the point of view of general philosophy and legal philosophy, one more issue,,seems to be of significance, namely the relation between the concepts of instinct and legal intuition. For some, they are two different cognitive abilities, and for others – they refer to the same phenomenon. Proponents of the first position point to different sources of cognitive dispositions, and the supporters of the other to the same role that instinct and intuition play in the process of legal cognition (legal interpretation), being something that would be best described as 'legal preknowledge.'[2]

Certainly, legal knowledge has many specific features that distinguish it from standard scientific knowledge.

I would like to discuss four different approaches to 'legal instinct': respectively, legal instinct as pre-apprehension, as the ability to recognize legal rules, as a kind of preknowledge of legal facts and as an innate cognitive ability. The classification proposed here may raise some doubts. First of all, I am not sure if the classes mentioned are separable. Nevertheless, despite the fact that the boundaries between various instances of legal instinct seem to be blurred, I would like to defend the proposed classification, since it allows us to say

[1]It will depend on many factors, especially culture, legal tradition and education.

[2]Stelmach, J. (2001) Die intuitiven Grundlagen der Jurisprudenz, in: Umwelt, Wirtschaft und Recht, Hrsg. Bauer, H. , Czybulka, D., Kahl, W. , Vosskuhle, A. , Mohr Siebeck, p. 161 and n.

more about both legal instinct and the many notions connected with it, especially legal intuition, pre-apprehension or finally, legal pre-knowledge.

Legal instinct as pre-apprehension

The problem of pre-apprehension has been widely discussed in hermeneutics, both philosophical and legal. Pre-apprehension (defined in the German literature mostly by two terms, namely *Vorverständnis* and *Vorurteil*) means the beginning, the Archimedean starting point for all cognitive processes of understanding. Here, it is necessary to recall that hermeneutics was the philosophy of interpretation, for which the concept of understanding was crucial. Pre-apprehension is preceded by a proper understanding process, which, according to Gadamer, whom I finally agree with, is synonymous with interpretation and application[3]. Here, essential for further discussion will be to settle the issue of whether pre-apprehension, and what follows – namely understanding, are interpreted as a kind of instinct or not. Hermeneutics itself does not help in this task. This is a heterogeneous type of philosophy of interpretation. Not only did there exist two different hermeneutical outlooks, methodological and ontological – within these outlooks, there were competing proposals of how to understand interpretation. At first glance, it seems that hermeneutics has always had a strong antinaturalistic stance, which would make it difficult to recognize pre-apprehension (or understanding itself) as a kind of cognitive instinct. It is an antinaturalistic philosophy, since, from the beginning, it has sought methods suitable for humanities, differentiating between understanding and scientific explanation. At the same time, within the methodological outlook, both in the thought of Scheleiermacher and Dilthey, the concepts of pre-apprehension and understanding were interpreted in psychological terms, precisely as a kind of interpretative instinct. Schleiermacher discussed the concept of a 'better understanding' (*besser Verstehen*), and Dilthey the idea of understanding as 'putting oneself into' (*Hineinversetzen*) the position of the person whose work or behavior we interpret[4]. Pre-apprehension and understanding are essentially phenomena from the field of psychology. In other words, they are instinctive forms of direct cognition – that is, cognition not based on earlier assumptions. We understand simply because we have an interpretive instinct. However, we have a more difficult problem with phenomenologically-oriented hermeneutics, which on the one hand is definitely anti-psychological, but on the other hand uses concepts that are also directly related to instinct, such as *Lebenswelt* or *Dasein*[5].

Speaking of legal instinct as a pre-apprehension or understanding, we reach for certain conceptual categories, which have so far been reserved for legal hermeneutics. Does this not pose a threat of confusing certain concepts and phenomena? In my opinion it is not the case, because we have no universally accepted definitions of these concepts. We refer at most to some primitive (archetypal) cognitive

[3]Gadamer, H. G. (1986) Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik, Gesammelte Werke, t. I, Tübingen, p. 312 and n.

[4]Stelmach, J. Die hermeneutische Auffassung der Rechtsphilosophie, p. 23 and n.

[5]The notion of Lebenswelt was used by Husserl, and the notion of Dasein was used by Heidegger. Husserl, E. (1982) Medytacje kartezjańskie, Warszawa, p. 26; Heidegger, M. (1994) Bycie i czas, Warszawa, p. 73, 116, 176, 191, 237, 245.

ideas that some would define as intuition, and others, in turn, as instincts.

Legal instinct as the ability to recognize legal rules

A 'good lawyer' should possess a certain ability to identify legal rules which, in consequence, allow him to correctly interpret the so-called difficult cases. This ability, in my opinion, is nothing more than a legal instinct. By using our pre-existing knowledge, practical experience, pre-apprehension, we are able to accomplish something essentially impossible, namely specify (indicate) a legal rule that we did not know existed before. According to Hart, we can do this because we have the 'natural' ability to recognize the rules and laws expressed by the 'rule of recognition'. The rule of recognition exists because it is 'genuinely accepted', and when it is accepted by both individuals and officials and lawyers, it provides us, as a 'final rule', with authoritative criteria for the recognition of original rules of duty[6]. This rule is, for me, the ability to recognize legal rules that build on the actual knowledge of the law, and in essence, on preknowledge, on familiarity with (understanding of) the environment in which the legal rules function. The operation of this rule is, in my opinion, another confirmation of the existence of a legal instinct. I find entering into disputes about other possible interpretations of the rule of recognition purely academic. Hart himself, arguing in this regard with Kelsen, states that the problem of whether or not the rule of recognition exists and what its content are, i.e., what are the criteria for the validity of a given system, is an empirical problem, however complex[7]. It is different in the case of Kelsen, for whom a 'basic norm' (*Grundnorm*) does not have any actual (empirical) justification, and therefore, it is not very relevant to the notion of legal instinct. A basic norm can be interpreted as a kind of intuition, permitting the study of the *a priori* structures that are present in law, which Kelsen referred to as a norm that is 'presupposed', 'fake', 'postulated' or a 'legal hypothesis'. Such understanding of the basic norm and many other key legal concepts is a consequence of Kelsen's adoption of a strong version of the hypothesis pertaining to the duality of being and duty, which is equivalent to advocating extreme legal antinaturalism.

Legal instinct as preknowledge of "legal facts'

In this case, we are presented with an unequivocally naturalistic approach to legal instinct. In this view, legal instinct can be interpreted in at least three different ways. First, biologically, as an primordial cognitive disposition. Second, psychologically, as a certain type of archetypal imaginations and emotions. Finally, thirdly and philosophically, as the ability to formulate judgments about facts based on basic impressions[8]. The problem that arises for the philosophical interpretation of instinct concerns primarily the issue of the empirical preknowledge of facts. Can something like that even be discussed? To be able to give a positive answer to this ques-

[6]Hart, H. L. A. (1998) Pojęcie prawa, Warszawa, p. 140 and n.; also Stelmach, J. (2001) The basic standard, in: Studies in the philosophy of law, Kraków, p. 67 and next.

[7]Hart, H. L. A. The concept of law, p. 387–388. In another place (p. 353), Hart says that the statement that the rule of recognition exists can only be external and factual.

[8]Rudolf Carnap referred to this type of judgment as 'protocol statements'.

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tion, we must either adopt a nativist point of view, reaching for biological arguments, or go in the direction of Kant and his conception of synthetic judgments *a priori,* which, although they are empirical judgments, do not have to be based on prior experience. It is difficult, however, to recognize Kant's conception as naturalistic, although, as may be worth noting, such attempts have also been made. So, if we assume that the naturalistic interpretation of instinct as preknowledge of preknowledge of legal facts. How otherwise otherwise would we explain the problem of legal preknowledge? As certain dispositions and interpretative abilities of the majority of members of a society (I would like to emphasize that this does not only concern lawyers) which are not based on prior systematized knowledge of the law? So, through what else, if not instinct – though some may of course say that through intuition – can legal 'self-knowledge' (preknowledge) be explained?

Instinct seems to provide some necessary 'adaptive minimum' for the survival of the individual in the world of law, including those individuals who, as I have already pointed out several times, are not legal professionals.

of facts is possible, then one more doubt remains to be clarified, namely, the understanding of a legal fact. There are two different interpretations that may be taken into consideration. According to the first, a legal fact is something empirical. This extremely naturalistic, monistic approach gives rise to further controversies, the main of them related to the so-called naturalistic fallacy. The second interpretation draws attention to the peculiarity of the legal fact, given its normative sense and meaning. Here, in turn, the basic objection boils down to the so-called antinaturalistic fallacy[9].

Despite these doubts, I am convinced that it is reasonable to talk about legal intuition as a kind

Legal instinct as an innate cognitive ability

Here, we also deal with a version of the naturalistic interpretation of instinct, perhaps most closely connected to the neuroscientific approach . There are many obvious similarities between this approach and the previous one. The difference, however, is that in the present case, we limit ourselves to only one concept of instinct, namely the one that speaks of instinct as an innate disposition correlated with the activity of the human brain. According to eminent representatives of *neuroscience*, Hanna and Antonio Damasio, there is no basis for opposing emotion to reason; there is no separate reason, because reason is embodied. The psychophysical problem is a fundamental fundamental problem within philosophy and psychology – that is, the problem of

[9]The 'Naturalistic' and 'Antinaturalistic' fallacies are discussed in the book by Brożek, A. , Brożek, B., Stelmach, J. (2013) Fenomen normatywności, Kraków, passim.

the relation between the soul (reason) and the body – becomes solvable with the acceptance of Damasio's theory. Antonio Damasio also speaks about how to understand the very concept of instinct. In his opinion, urges and instincts are controlled by innate neural circuits[10]. The idea of 'embodied reason' which he adopts causes that the standard objections that are formulated against the nativist conception of cognition lose their cogency. Of course, I cannot say anything meaningful about 'innate neural circuits,' but I am sure we have knowledge of phenomena and facts that we have never dealt with before. Although they were not the subject of prior cognition, we can predict, explain and interpret them. This also applies to 'legal self-knowledge', possessed by at least some individuals, not only lawyers – which I have already mentioned before, when writing about legal instinct as preknowledge of legal facts. It is difficult, therefore, not to associate this kind of ability with the notion of legal instinct.

Eventually, it is not a question about the existence of instinct, as well as legal instinct, which is the subject of controversy, but the problem of the origin of that cognitive ability. Should we consider it as an innate ability, a disposition connected with workings of the brain, or rather as something that is shaped by 'external experience', the whole empirical context, knowledge, background, education, culture, and cognitive habits? There is also a third possibility according to which both of these sources are equally important to explain legal instinct[11].

The role of instinct in legal cognition

Instinct seems to provide some necessary 'adaptive minimum' for the survival of the individual in the world of law, including those individuals who, as I have already pointed out several times, are not legal professionals. This is a cognitive disposition that allows us to build a certain 'image of law'. Ultimately, whether someone will claim that there is a legal intuition, or an instinct, will not really matter so much because their role in the practice of interpretation is ultimately the same. It will always be about a certain type of direct cognition, regardless of whether we use the notion of intuition or instinct. The rest is only a consequence of previously accepted philosophical assumptions. If one prefers the analytical approaches and thus reflects on the phenomenon of conceptual or phenomenological cognition and the concept of *a priori* knowledge, he will prefer to use the notion of intuition to define any direct cognitive acts. In turn, the proponent of a more naturalistic vision of law, in the context of ontology as well as epistemology and axiology of law, will most likely use the notion of instinct to discuss the direct types of legal cognition. And this might be where the problem lies; I refer here to the endless disputes and academic debates. If we base our positions on different philosophical assumptions, we accept different ontologies, and as a consequence, also different epistemologies and axiology of law, we are not able to communicate, because we are simply talking about different things.

[10]Damasio, H., Damasio, A. (1989) Lesion Analysis in Neuropsychology, Oxford University Press ; Damasio, A. (1999) Błąd Kartezjusza, Poznań.

[11]Which would be in compatible with Hanna and Antonio Damasio's conception, according to which it is not reasonable to oppose reason and emotions.

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